Supreme Court, U. S.
FILED
APR 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1312

MARY ANN TURNER,

Petitioner,

—v.—

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN PERATIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016
Attorneys for Petitioner

INDEX

	PAGE
Opinion Below----------	1
Jurisdiction----------	2
Question Presented----------	2
Statutory Provision Involved------	2
Statement of the Case----------	3
Reasons for Granting the Writ-----	5
I. The Decision Below Is in Direct Conflict With Recent Decisions of This Court---	5
a. Utah Code Ann. §35-4-5 (h) establishes a conclusive presumption that every pregnant woman, at the end of the second trimester, is unfit for gainful employment ----------	5
b. The decision below, upholding Utah Code Ann. §35-4-5(h) against fourteenth amendment challenge, is irreconcilable with the decision of this Court in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)-	6

PAGE

II. The Decision Below is Inconsistent With the Clear Trend of Federal and State Authority; Guided by This Court's Recent Opinions, Federal and State Tribunals and Administrators, With Virtual Unanimity, Have Declared Unconstitutional Laws that Conclusively Presume Pregnant Women Unable To or Unavailable For Work at the End of the Second Trimester ---------- 8

III. The Decision Below and the State Statute It Upholds Conflict With the Objective of the Federal Unemployment Insurance Program and Therefore With the Supremacy Clause of the Federal Constitution--- 10

CONCLUSION ---------- 12

APPENDIX ----------

Opinion of the Supreme Court of the State of Utah---------- 1a

Petition for Review 7a

TABLE OF AUTHORITIES

PAGE

Cases:

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873)--------- 5

California Dept. of Human Resources Development v. Java, 402 U.S. 121, 130 (1970) ----------10,11

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)---4,6,7, 8

Cunningham v. ESC, 4 CCH Unempl. Ins. Rep. (Iowa)¶8142 (Dist. Ct. Johnson City 1973)--------- 10

Goodman v. Chrysler Corp., 5 CCH Unempl. Ins. Rep. (Mich) ¶9341 (Wayne Cty. Cir. Ct. 1973)---- 10, 11

Hanson v. Hutt. 10 CCH Unempl. Ins. Rep. (Wash.) ¶8530 (Super. Ct.1973) aff'd, 83 Wash. 2d 195 517 P.2d 599 (Wash.1973). ----- 9, 10

Heier v. DILHR, 10 CCH Unempl. Ins. Rep. (Wisc.) ¶8637 (Wisc. Cir. Ct. 1973)---------- 10

Jordan v. Meskill, 1A CCH Unempl. Ins. Rep. ¶21,420 (D. Conn.1973) remanded on other grounds, 496 F.2d 646 (2d Cir.1974). 9

PAGE

Laska v. Garnes, 1A CCH Unempl. Ins. Rep. ¶21,421 (N.D. Ohio 1973)------ 9

Lathrop v. DILHR, 10 CCH Unempl. Ins. Rep. (Wisc.) ¶8637 (Wisc. Cir. Ct. 1973) ---------- 10

Orner v. Board of Appeals, 5 CCH Unempl. Ins. Rep. (Md.) ¶8387 (Super. Ct. Balt. 1972)---------- 10

Stanley v. Illinois, 405 U.S. 645 (1972)---------- 4, 8

Stickel v. Mason, 1A CCH Unempl. Ins. Rep. ¶21,415 (D. Md. 1973)--------- 9

UAW v. Taylor, 9 EPD ¶9878 (E.D. Mich. 1974)---------- 9,11

United States Department of Agriculture v. Murry, 413 U.S. 508 (1973)-- 8

Vlandis v. Kline, 412 U.S. 441 (1973)-- 8

Constitutional Provisions, Statutes and Other Authorities:

United States Constitution
Fourteenth Amendment ---------- 5
Article IV, cl. 2 ---------- 11

PAGE

Utah Code Ann. §35-4-5 (Replacement Vol. 4b) ---------- 2,4
35-4-5(h) ----- 2,5,6,9
35-4-9 -------- 10

Utah Rules of Civil Procedures, Rule 75(o)---------- 3

Michigan: Attorney General's Opinion dated Feb. 18, 1972 CCH Empl. Prac. Guide 5051 -- 10

Oklahoma: Attorney General's Opinion No. 72-211, Nov.22, 1972 8 CCH Unempl. Ins. Rep. (Okla.) 8144 ---------- 10

Pennsylvania: Attorney General's Opinion No. 9, Feb. 7,1974 CCH Empl. Prac. Guide 5220--- 10

Tribe, L., From Environment Foundations to Constitutional Structures: Learning from Nature's Future, 84 Yale L.J. 545, 553-56 (1975) ---------- 8

U.S. Department of Labor Unempl. Ins. Program Letter No.1097 Dec. 31,1970)---------- 9,11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

MARY ANN TURNER,

Petititoner

-v-

DEPARTMENT OF EMPLOYMENT SECURITY
AND BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF UTAH

The petitioner, Mary Ann Turner, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered on February 4, 1975.

Opinion Below

The February 4,1975 opinion of the Supreme Court of the State of Utah has not yet been officially reported. It is set out in the Appendix, infra, pp. 1a.

Jurisdiction

The judgment of the Supreme Court of the State of Utah, refusing to declare unconstitutional Utah Code Ann. §35-4-5(h), was entered on February 4,1975. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Question Presented

Whether Utah Code Ann. §35-4-5(h) which conclusively presumes that every pregnant worker is unfit for gainful employment at the end of the second trimester, violates the fourteenth amendment to the United States Constitution.

Statutory Provision Involved

Utah Code Ann. §35-4-5 (1953) (Replacement Vol. 4b) provides, in pertinent part:

An individual shall be ineligible for benefits . . .

(h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth; and (2) during any week of unemployment when it is found by the commission that her total or partial unemployment is due to pregnancy.

Statement of the Case[1]

Petitioner Mary Ann Turner was seperated involuntarily from her employment on November 3,1972 for reasons unrelated to pregnancy. She was then pregnant; the expected date of the birth of her child was June 6,1973.

Petitioner duly filed a proper claim for unemployment benefits with respondent Department of Employment Security. She was in all respects eligible for such benefits; she had sufficient base period wage credits; she had not left her prior employment without good cause; and she was able to and available for work.

On March 22,1973 respondent Department of Employment Security disqualified petitioner from receiving unemployment benefits for a period beginning March 11,1973, twelve weeks prior to the expected date of childbirth, and continuing for six weeks after childbirth. The sole reason for the disqualification was the application of Utah Code

---

[1] These facts were stipulated by the parties before the Supreme Court of the State of Utah pursuant to Rule 75(o), Utah Rules of Civil Procedure.

Ann. §35-4-5 which establishes a conclusive presumption that pregnant women are unable to work or unavailable for work throughout the last trimester of pregnancy and for six weeks thereafter. It is undisputed that petitioner's pregnancy did not render her unable to work. In fact, during the last trimester, she worked intermittently on call as a temporary clerical worker.

Petitioner timely appealed to the Appeals Referee and then to respondent Board of Review of the Industrial Commission of Utah. The disqualification was affirmed in both instances.

A direct, timely appeal from the final administrative determination of respondent Board of Review was taken to the Supreme Court of the State of Utah. Affirming the administrative agency ruling, the Utah Supreme Court reasoned that a law denying unemployment compensation to a pregnant woman "violates no constitutional requirement,"[2] because it merely reflects "the bio-

---

[2] App. infra, p.4a. As in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) and Stanley v. Illinois, 405 U.S.645 (1972), due process analysis is within the purview of the fourteenth amendment challenge here. Plainly, the Utah Supreme Court found the statute free from any state of federal constitutional flaw.

logical law of nature." Advising petitioner that she had come to the wrong forum, the court suggested she appeal to the 'Great Creator." [3]

The federal question was raised below in the petitioner's Petition For Review, filed in the Supreme Court of the State of Utah, in which the final decision of the Board of Review of the Industrial Commission of Utah is appealed on the basis that:

> the statute . . . is a violation of the Fourteenth Amendment to the United States Constitution.

Reasons for Granting the Writ

I. The Decision Below Is in Direct Conflict With Recent Decisions of This Court.

   a. Utah Code Ann. §35-4-5(h) establishes a conclusive presumption that every pregnant woman, at the end of the second trimester, is unfit for gainful employment.

---

[3] App. infra, p. 3a. Cf. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (concurring opinion) (attributing to "the law of the Creator" woman's unfitness for "many of the occupations of civil life").

b. The decision below, upholding Utah Code Ann. §35-4-5(h) against fourteenth amendment challenge, is irreconcilable with the decision of this Court in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

Though involuntarily unemployed, petitioner was denied unemployment compensation for the sole reason that Utah Code Ann. §35-4-5(h) categorically denies benefits to pregnant women twelve weeks prior to the expected date of childbirth. Petitioner was ready, willing and able to work; she in fact worked in temporary positions during the period in question. The statute at issue leaves no room for individualized determination, for medical certification of ability to continue working, for consideration of performance on the job. With a single broad stroke, and in total disregard of the applicant's ability to and availability for work, the statute declares all women workers unfit, incapable, incompetent throughout the last trimester of pregnancy.

In Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), this Court recognized the invidious character of official classifications that automatically and absolutely disqualify pregnant women from membership in the work force. La Fleur invalidated mandatory maternity leave or forced termination rules that required school teachers to leave the classroom at the fifth of sixth month of pregnancy. Responding to the school board's justification that "at

least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy," this Court said:

> [T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination . . . as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to the individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

The conclusive presumption of unfitness here is identical to the one at issue in La Fleur.[6] Utilizing rule of thumb

---

[6] Significantly, the Utah Supreme Court did not even acknowledge the existence of the La Fleur decision. It ignored petitioner's argument that the statute was constitutionally defective because it excluded all women at the end of the second trimester on the ground that some women in the designated class may be unable to work. Rather, the Court accepted as universally true the unproved assumption that women entering the third trimester are unable to work. It said, "[s]hould a man be unable to work be-

rather than individualized determination, the state insulates from attack unproved assumptions concerning the appropriate place for conspicuously pregnant women.[7] Victorian notions that such women are properly confined at home remain frozen in the law of Utah, because official fiat deprives women of the opportunity to prove those notions false. As in La Fleur, supra, and Stanley v. Illinois, 405 U.S. 645 (1972), the convenient categorical disposition here is irrational and arbitrary, hence violative of due process. See also Vlandis v. Kline, 412 U.S. 441 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); L. Tribe, From Environment Foundations to Constitutional Structures: Learning from Nature's Future, 84 Yale L.J. 545, 553-56 (1975).

II. The Decision Below is Inconsistent With The Clear Trend of Federal And State Authority: Guided by This Court's Recent

---

cause he was pregnant, the statute would apply to him . . . ." App. infra, p. 3a (emphasis supplied).

[7] The extent to which such assumptions infect the decision below is conspicuous throughout the opinion. The court asserts, "few women would wish to change the situation," and a concurring justice adds "[t]he course of nature with respect to pregnancy is so well known as to require no expatiation." See App. infra, pp. 3a-4a,5a.

Opinions, Federal and State Tribunals and Administrators, With Virtual Unanimity, Have Declared Unconstitutional Laws that Conclusively Presume Pregnant Women Unable To or Unavailable For Work at the End of the Second Trimester.

Laws of the Utah Code Ann. §35-4-5 (h) genre have been identified by the United States Department of Labor (Manpower Administration) as constitutionally vulnerable and inconsistent with federal law and policy proscribing gender discrimination in employment. More than four years ago states were advised by the Department to alter statutory and regulatory provisions that exclude women from unemployment compensation benefits solely on the ground of pregnancy. U.S. Dept. of Labor Unempl. Ins. Program Letter No. 1097 (Dec. 31,1970).

Exclusions similar to Utah's have been declared unconstitutional in an array of recent authority; federal courts UAW v. Taylor, 9 EPD ¶9878 (E.D. Mich. 1974); Jordan v. Meskill, 1A CCH Unempl. Ins. Rep. ¶21,420 (D. Conn. 1973), remanded on other grounds, 496 F.2d 646 (2d Cir.1974); Stickel v. Mason, 1A CCH Unempl. Ins. Rep. ¶21, 415 (D. Md. 1973); Laska v. Garnes, 1A CCH Unempl. Ins. Rep. ¶21,421 (N.D. Ohio 1973); state courts Hanson v. Hutt, 10 CCH Unempl. Ins. Rep.

(Wash.) ¶8530 (Super. Ct. 1973), aff'd, 83 Wash. 2d 195, 517 P.2d 599 (Wash. 1973); Goodman v. Chrysler Corp., 5 CCH Unempl. Ins. Rep. (Mich.) ¶9341 (Wayne Cty. Cir. Ct. 1973); Heier v. DILHR and Lathrop v. DILHR, 10 CCH Unempl. Ins. Rep. (Wisc.) ¶8637 (Wisc. Cir. Ct. 1973); Orner v. Board of Appeals, 5 CCH Unempl. Ins. Rep. (Md.) ¶8387 (Super. Ct. Balt. 1972); Cunningham v. ESC, 4 CCH Unempl. Ins. Rep. (Iowa) ¶8142 (Dist. Ct. Johnson Cty. 1973)); state attorneys general (Michigan: Attorney General's Opinion dated Feb. 18, 1972, CCH Empl. Prac. Guide ¶5051; Oklahoma: Attorney General's Opinion No. 72-211, Nov. 22, 1972, 8 CCH Unempl. Ins. Rep. (Okla.) ¶8144; Pennsylvania: Attorney General's Opinion No. 9, Feb. 7,1974, CCH Empl. Prac. Guide ¶5220).

III. The Decision Below and the State Statute It Upholds Conflict With the Objective of the Federal Unemployment Insurance Program and Therefore With the Supremacy Clause of the Federal Constitution.

The Utah unemployment insurance law was enacted pursuant to and is financed in conjunction with the federal unemployment insurance program. See 42 U.S.C. §§501 et seq., 1103, 1104; 26 U.S.C. §3301 et seq.; Utah Code Ann. §35-4-9.

This Court identified the core purpose of all federal-state cooperative unemployment insurance programs in California Dept. of Human Resources Development v. Java,

402 U.S. 121, 130 (1970):

> The objective of Congress [in enacting the unemployment compensation insurance program] was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.

As indicated in UAW v. Taylor, supra, and Goodman v. Chrysler Corp., supra, categorical exclusion of workers at the end of the second trimester of pregnancy frustrates and impedes the stated federal law policy. See also U. S. Dept. of Labor Unempl. Ins. Program Letter No.1097 (Dec. 31,1970). Accordingly, the exclusion fails under the supremacy clause, art. IV, cl. 2, of the Federal Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN PERATIS

American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

April 1975

APPENDIX

IN THE

SUPREME COURT OF THE STATE OF UTAH

MARY ANN TURNER,

Plaintiff,

-v-

DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

No. 13395

F I L E D
February 4,1975

Allan E. Mecham,
Clerk

ELLETT, Justice:

The plaintiff herein appeals from a denial of unemployment benefits for 18 weeks, 12 before and 6 after delivery of her child. The parties stipulated to the facts of this case, to wit: Mrs. Turner was separated involuntarily from her work for reasons not related to pregnancy. She drew unemployment compensation until 12 weeks before the expected date of the birth of her child and again commencing 6 weeks thereafter. She was entitled to 36 weeks pay during her year, but due to the provisions of the statute relating to pregnancy, she was able to collect for only 30 weeks.

The statute in question[1] reads:

> An individual shall be ineligible for benefits . . .
>
> * * *
>
> (h) For any week (1) within the twelve calendar weeks prior to the expected date of such individual's childbirth and within the 6 calendar weeks after the date of such childbirth; and (2) during any week of unemployment <u>when it is found by the commission that her total or partial unemployment is due to pregnancy</u>. [Emphasis added.]

Mrs. Turner attacks the statute above set out as being unconstitutional under Art. I, Sec. 2, of the Constitution of Utah, which reads:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

---

[1] Sec. 35-4-5, U.C.A. 1953 (Replacement Vol. 4b).

She also claims that the statute is in violation of Art. IV, Sec. 1, which reads:

> The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

The question she poses is this: Is the statute set out above void in that it denies to her rights which are given to males?

We do not think so. Should a man be unable to work because he was pregnant, the statute would apply to him equally as it does to her. What she should do is to work for the repeal of the biological law of nature. She should get it amended so that men shared equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.

It is just as bad to treat unequal things as equals as it is to treat equal things unequally. In the matter of pregnancy there is no way to find equality between men and women. The Great Creator so ordained the difference, and there are few

women who would wish to change the situation.

There is nothing in the Constitution which guarantees unemployment compensation to any person. To deny a pregnant woman pay for not working during her pregnancy violates no constitutional requirement.

The ruling of the Commission is affirmed. No costs are awarded.

WE CONCUR:

R. L. Tuckett, Justice

Richard J. Maughan, Justice

CROCKETT, Justice: (Concurring specially)

I concur with the main opinion, but add some observations without intending any disparagement thereof. I realize the likelihood that its underlying rationale gets to the core of the problem and disposes of it in a more adroit way than I may appreciate. Nevertheless, for my own purpose, I state two propositions which I think support the decision of the Commission and the affirmative thereof by the main opinion.

The purpose of the unemployment compensation system is to provide compensation for persons who are involuntarily unemployed and who are available for employment.[1]

The course of nature with respect to pregnancy is so well known as to require no expatiation. I think the restriction of compensation during the 12 weeks before and 6 weeks after delivery of a baby is a reasonable requirement, in harmony with the above stated purpose of the stature;[2] and a safeguard against possible improper predations on the fund. There are many burdens involved in the bearing and rearing of children, which must be borne by those who

---

[1] Section 35-4-4(c), U.C.A. 1953; Martinez v. Board of Review, Dept. of Employment Security, 25 Utah 2d 131, 477 P. 2d 587.

[2] That pregnancy is a valid basis for different classification and treatment of individuals see Geduldig v. Aiello,____ U.S. ____, 94 S.Ct. 2485 (1974).

take on that responsibility, or in certain exigencies, assisted by other governmental programs. But the system for compensation for persons involuntarily unemployed who are available for work was not intended nor designed to extend to that area.

Henriod, Chief Justice, concurs in the views expressed in the concurring opinion of Mr. Justice Crockett.

No. 13395

IN THE
SUPREME COURT OF THE STATE OF UTAH

Claim No. 73-BR-769

MARY ANN TURNER
SSA NO. 528-78-8823,

Plaintiff,

-v-

DEPARTMENT OF EMPLOYMENT SECURITY, AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Defendants.

PETITION FOR REVIEW

Case No. 13395

Plaintiff in above entitled action hereby files Petition for Review from the final decision of the Board of Review of the Industrial Commission of Utah, Claim No. 73-BR-769. Plaintiff is appealing the decision of the Board of Review on the basis that the statute relied upon by the Board of Review is in violation of the Fourteenth Amendment to the United States Constitution and a violation of the Utah Constitution.

Dated this 18th day of July, 1973.

CONSTANCE K. LUNDBERG
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Appellant
79 South State Street
Salt Lake City, Utah 84111